

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

TINA M. GLASGOW,
Plaintiff,
v.
MICHAEL J. ASTRUE,
Commissioner of Social
Security,
Defendant.

)
) No. CV-09-0223-CI
)
) ORDER GRANTING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND REMANDING FOR ADDITIONAL
) PROCEEDINGS PURSUANT TO 42
) U.S.C. § 405(g)
)
)
)

BEFORE THE COURT are cross-Motions for Summary Judgment. (Ct. Rec. 13, 15.) Attorney Maureen J. Rosette represents Plaintiff; Special Assistant United States Attorney Michael S. Howard represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 7.) After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Plaintiff's Motion for Summary Judgment and remands the case to the Commissioner for additional proceedings.

On February 26, 2007, Tina Marie Glasgow (Plaintiff) protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI). (Tr. 119.) She alleges onset of disability on February 6, 2006, due to degenerative arthritis, back pain and asthma. (Tr. 123.) Plaintiff's date of last insured for DIB purposes was March 31, 2010. (Tr. 11.)

Following a denial of benefits at the initial stage and on reconsideration, a hearing was held before Administrative Law Judge

1 (ALJ) R. S. Chester on October 23, 2008. (Tr. 25-49.) Plaintiff,
 2 who was represented by counsel, and vocational expert Deborah N.
 3 Lapoint, appeared and testified. (*Id.*) On November 28, 2009, ALJ
 4 Chester denied benefits. (Tr. 11-21.) The Appeals Council denied
 5 Plaintiff's request for review. (Tr. 1-4.) This appeal followed.
 6 Jurisdiction is appropriate pursuant to 42 U.S.C. § 405(g).

7 **STANDARD OF REVIEW**

8 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 9 court set out the standard of review:

10 The decision of the Commissioner may be reversed only
 11 if it is not supported by substantial evidence or if it is
 12 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,
 13 1097 (9th Cir. 1999). Substantial evidence is defined as
 14 being more than a mere scintilla, but less than a
 15 preponderance. *Id.* at 1098. Put another way, substantial
 16 evidence is such relevant evidence as a reasonable mind
 17 might accept as adequate to support a conclusion.
Richardson v. Perales, 402 U.S. 389, 401 (1971). If the
 18 evidence is susceptible to more than one rational
 19 interpretation, the court may not substitute its judgment
 20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;
Morgan v. Commissioner of Social Sec. Admin. 169 F.3d 595,
 599 (9th Cir. 1999).

21 The ALJ is responsible for determining credibility,
 22 resolving conflicts in medical testimony, and resolving
 23 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 24 Cir. 1995). The ALJ's determinations of law are reviewed
 25 *de novo*, although deference is owed to a reasonable
 26 construction of the applicable statutes. *McNatt v. Apfel*,
 27 201 F.3d 1084, 1087 (9th Cir. 2000).

28 It is the role of the trier of fact, not this court, to resolve
 29 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
 30 supports more than one rational interpretation, the court may not
 31 substitute its judgment for that of the Commissioner. *Tackett*, 180
 32 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in
 2 weighing the evidence and making the decision. *Brawner v. Secretary*
 3 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 4 there is substantial evidence to support the administrative
 5 findings, or if there is conflicting evidence that will support a
 6 finding of either disability or non-disability, the finding of the
 7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 8 1230 (9th Cir. 1987).

9 **SEQUENTIAL PROCESS**

10 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the
 11 requirements necessary to establish disability:

12 Under the Social Security Act, individuals who are
 13 "under a disability" are eligible to receive benefits. 42
 14 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any
 15 medically determinable physical or mental impairment"
 16 which prevents one from engaging "in any substantial
 17 gainful activity" and is expected to result in death or
 18 last "for a continuous period of not less than 12 months."
 19 42 U.S.C. § 423(d)(1)(A). Such an impairment must result
 20 from "anatomical, physiological, or psychological
 21 abnormalities which are demonstrable by medically
 22 acceptable clinical and laboratory diagnostic techniques."
 23 42 U.S.C. § 423(d)(3). The Act also provides that a
 24 claimant will be eligible for benefits only if his
 25 impairments "are of such severity that he is not only
 26 unable to do his previous work but cannot, considering his
 27 age, education and work experience, engage in any other
 28 kind of substantial gainful work which exists in the
 national economy . . ." 42 U.S.C. § 423(d)(2)(A). Thus,
 the definition of disability consists of both medical and
 vocational components.

23 The Commissioner has established a five-step sequential
 24 evaluation process for determining whether a person is disabled. 20
 25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
 26 137, 140-42 (1987). In steps one through four, the burden of proof
 27 rests upon the claimant to establish a *prima facie* case of
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1 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
2 920, 921 (9th Cir. 1971). This burden is met once a claimant
3 establishes that a physical or mental impairment prevents her from
4 engaging in her previous occupation. 20 C.F.R. §§ 404.1520(a)(4)(i-
5 iv), 416.920(a)(4)(i-iv). At step five, the burden shifts to the
6 Commissioner to show that (1) the claimant can perform other
7 substantial gainful activity; and (2) a "significant number of jobs
8 exist in the national economy" which claimant can perform. 20
9 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722
10 F.2d 1496, 1498 (9th Cir. 1984).

11 **STATEMENT OF FACTS**

12 The facts of the case are set forth in detail in the transcript
13 of proceedings, and are summarized briefly here. At the time of the
14 hearing, Plaintiff was 49 years old, unmarried with two adult
15 children. She stated she lived in a house with her daughter and
16 grandchildren. (Tr. 30-32.) She has a tenth grade education and is
17 a certified nurse's aide. (Tr. 34.) Plaintiff has past work
18 experience as a home attendant, nurse's aide, cashier, checker,
19 dishwasher, bartender, and a stock clerk. (Tr. 44-45.) She
20 testified she cannot work because of back pain and limitations in
21 her ability to stand and sit for any length of time. (Tr. 35-36.)
22 She also reported things drop from her hand because of problems with
23 arthritis and numbness in her right hand. (Tr. 42.) Plaintiff
24 testified she has been unable to stop smoking, and she uses a
25 nebulizer for chronic asthma. (Tr. 41.)

26 **ADMINISTRATIVE DECISION**

27 The ALJ found Plaintiff had not engaged in substantial gainful
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1 activity since her alleged onset date. (Tr. 13.) At step two, he
2 found Plaintiff has medically determinable impairments of
3 "degenerative disk disease of the lumbar and cervical spine, asthma,
4 depression, cannabis dependence, and opioid dependence." (Id.) He
5 found non-severe impairments of gastroesophageal reflux disease and
6 nicotine dependence. (Tr. 14.) At step three, the ALJ found
7 Plaintiff's impairments alone and in combination did not meet or
8 medically equal a listed impairment in 20 C.F.R. Part 404, Subpart
9 P, Appendix 1 (Listings). (Tr. 18.) At step four, he found
10 Plaintiff had the residual functional capacity (RFC) to perform
11 light work with several non-exertional limitations. (Tr. 16.)
12 After summarizing the evidence, including Plaintiff's testimony, the
13 ALJ found Plaintiff's allegations of disabling symptoms were not
14 credible to the extent they were inconsistent with his assessment.
15 (Tr. 13-18.) Based in part on VE testimony, the ALJ concluded
16 Plaintiff's RFC would allow her to perform past relevant work as a
17 bartender and cashier checker. (Tr. 19.) He proceeded to step
18 five and found there was a significant number of other jobs in the
19 national economy Plaintiff could perform with her current RFC, such
20 as parking lot attendant, outside deliverer and seated cashier.
21 (Tr. 19-20.) He concluded Plaintiff was not disabled, as defined by
22 the Social Security Act, from her alleged onset date through the
23 date of his decision. (Tr. 20.)

24 **ISSUES**

25 The question presented is whether there is substantial evidence
26 to support the ALJ's decision denying benefits and, if so, whether
27 that decision is based on proper legal standards. Plaintiff
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1 contends the ALJ erred when he (1) failed to properly evaluate her
 2 treating medical provider opinions; (2) discounted her testimony;
 3 and (3) assessed her RFC. (Ct. Rec. 14 at 11-18.)

4 **DISCUSSION**

5 **A. Credibility**

6 As stated by the Ninth Circuit:

7 An ALJ cannot be required to believe every allegation of
 8 disabling pain, or else disability benefits would be
 9 available for the asking, a result plainly contrary to 42
 10 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
 the claimant introduces medical evidence showing that he
 has an ailment reasonably expected to produce some pain;
 many medical conditions produce pain not severe enough to
 preclude gainful employment.

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 12 *Fair v. Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). In deciding
 13 whether to admit a claimant's subjective symptom testimony, the ALJ
 14 must engage in a two-step analysis. *Smolen v. Chater*, 80 F.3d 1273,
 15 1281 (9th Cir. 1996). Under the first step, the claimant must
 16 produce objective medical evidence of underlying "impairment," and
 17 must show that the impairment, or a combination of impairments,
 18 "could reasonably be expected to produce pain or other symptoms."
 19 See *Cotton v. Bowen*, 799 F.2d 1403, 1407 (9th Cir. 1986) (overruled on
 20 other grounds). If this test is satisfied, the ALJ may reject a
 21 claimant's testimony if he finds affirmative evidence of
 22 malingering. *Benton v. Barnhart*, 331 F.3d 1030, 1040 (9th Cir.
 23 2003). However, where there is no affirmative evidence of
 24 malingering, a claimant's testimony may be rejected only with
 25 specific "clear and convincing" reasons). *Lester v. Chater*, 81 F.3d
 26 821, 834 (9th Cir. 1995).

27 In addition to ordinary techniques of credibility evaluation,
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1 the ALJ may consider the following factors when weighing the
2 claimant's credibility: the claimant's reputation for truthfulness,
3 inconsistencies either in her allegations of limitations or between
4 her statements and conduct, daily activities and work record, and
5 testimony from physicians and third parties concerning the nature,
6 severity, and effect of the alleged symptoms. *Fair*, 885 F.2d 597
7 n.5 (9th Cir. 1989); *Light v. Social Sec. Admin.*, 119 F.3d 789, 792
8 (9th Cir. 1997). If the ALJ's credibility finding is supported by
9 substantial evidence in the record, the court may not engage in
10 second-guessing. See *Morgan*, 169 F.3d at 600; *Fair*, 885 F.2d at 604
11 ("[C]redibility determinations are the province of the ALJ").

12 After finding Plaintiff's medically determinable impairments
13 could be expected reasonably to cause the alleged symptoms (Tr. 17),
14 ALJ Chester summarized Plaintiff's testimony: she could not work
15 because her back hurts all the time; she is unable to sit, stand or
16 walk for very long; her hands go numb three or four times a day for
17 a half hour to two hours; she needs to lie down three to four times
18 a day; and she has trouble breathing and uses a nebulizer four times
19 a day. (Tr. 17.) He found her testimony was not credible to the
20 extent her self-reported symptoms were inconsistent with her ability
21 to do the light work described in his RFC findings. (*Id.*) He first
22 found her statements were inconsistent with objective medical
23 evidence, which showed her back problems existed prior to her claim
24 of disability, but does not show any worsening of her condition.
25 (*Id.*) This reason alone would be insufficient to reject Plaintiff's
26 statements. *Lester*, 81 F.3d at 834. However, it is supported by
27 substantial evidence, and it is not the only reason given by the
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1 ALJ. He also found her self-reported limits on sitting were not
2 consistent with her testimony that she could ride in a car for two
3 hours, and she was planning a road trip. (Tr. 17.) He found the
4 records indicate a pattern of drug seeking behavior, a finding that
5 significantly impugns her testimony. See *Verduzco v. Apfel*, 188
6 F.3d 1087, 1090 (9th Cir. 1999).

7 As found by the ALJ, and indicated by reports from medical
8 providers, Plaintiff has been non-compliant in her prescribed
9 dosages and violated her pain medication contract several times; she
10 has been insistent that her doctors provide her pain medication,
11 even when she has been non-compliant; and she tested positive for
12 cannabis - behaviors that call into question whether she is actually
13 experiencing pain or is seeking narcotics for her addiction. (Tr.
14 17-18.) The ALJ's reasoning is supported by reports from emergency
15 room personnel who treated Plaintiff for polypharmacy-related
16 psychiatric issues. (Tr. 510.) Hospital physician Arnold Kadrmas,
17 M.D., reported Plaintiff was initially cooperative during her
18 hospitalization with efforts to decrease her medication. However,
19 during the course of her stay, her reports of back pain and demands
20 for pain medication were increasingly demanding and incongruent with
21 her activities (including exercise classes). As observed by staff,
22 she did not demonstrate excessive pain behavior at these times.
23 (Tr. 510-11.) Dr. Kadrmas noted, "She remained significantly
24 focused on getting pain medication for her back," but did not want
25 to go to chemical dependency counseling as recommended. (Tr. 511.)
26 Dr. Kadrmas also reported that at discharge, after medications were
27 decreased, there was no evidence of delirium, depression, or
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1 suicidal ideation. (Tr. 511.) He shared his recommendations
 2 regarding decreasing medications and chemical dependency treatment
 3 with Plaintiff's treating physician. (Tr. 513.) The ALJ's findings
 4 regarding Plaintiff's narcotic seeking behavior are "clear and
 5 convincing" reasons to discount her pain and limitation testimony.

6 In addition, the ALJ noted Plaintiff's description of her
 7 breathing problems are undermined by her refusal to quit smoking -
 8 a refusal which diminishes her allegations of symptom severity. The
 9 ALJ's "clear and convincing" reasoning is supported by substantial
 10 evidence in the record and, therefore, will not be disturbed.

11 **B. Evaluation of Medical Opinions**

12 In addition to the credibility findings discussed above, the
 13 ALJ found Plaintiff's treating physician Anthony Lundberg, D.O.,
 14 opined in March 2006, that Plaintiff could do light work. He gave
 15 this opinion significant weight. (Tr. 18.)¹ However, Plaintiff
 16 argues this finding is not supported by substantial evidence
 17 because, in a form report dated January 24, 2007, and submitted to
 18 the state public assistance program, Dr. Lundberg endorsed a
 19 "severely limited" finding and opined she would be restricted in
 20 numerous work activities. (Tr. 319.) Plaintiff contends findings
 21 in this report were ignored impermissibly by the ALJ, and as such,

22 ¹ In discussing Dr. Lundberg's opinion that Plaintiff could
 23 perform light work, the ALJ referenced a date of March 2006 (Tr.
 24 18), which appears to be a clerical error. The clinic note in which
 25 he told Plaintiff she could "certainly do light duty work," was
 26 entered on November 7, 2006, in response to a telephone inquiry from
 27 Plaintiff. (Tr. 303.)
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1 they must be credited and given controlling weight. (Ct. Rec. 14 at
 2 12.) She also posits the ALJ failed to give legally sufficient
 3 reasons for rejecting treating medical providers Mary Barinaga,
 4 M.D., and Blaze Burnham, ARNP. (*Id.* at 13-15.)

5 In evaluating a disability claim, the adjudicator must consider
 6 all medical opinions provided. 20 C.F.R. §§ 404.1527(d),
 7 416.927(d). A treating or examining physician's opinion is given
 8 more weight than that of a non-examining physician. *Benecke v.*
 9 *Barnhart*, 379 F.3d 587, 592 (9th Cir. 2004). If a treating
 10 physician's opinions are not contradicted, they can be rejected by
 11 the decision-maker only with "clear and convincing" reasons. *Lester*
 12 *v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). If contradicted, the
 13 ALJ may reject the opinion with specific, legitimate reasons that
 14 are supported by substantial evidence. *Lester*, 81 F.3d at 830-31;
 15 *Flaten v. Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463
 16 (9th Cir. 1995). Final resolution of conflicts in the medical
 17 evidence is the sole responsibility of the ALJ. *Andrews*, 53 F.3d at
 18 1039.

19 The ALJ need not accept a treating source opinion that is
 20 "brief, conclusory and inadequately supported by clinical finding."
 21 *Lingenfelter v. Astrue*, 504 F.3d 1028, 1044-45 (citing *Thomas v.*
 22 *Barnhart*, 278 F.3d 947, 957 (9th Cir. 2002)). Where an ALJ
 23 determines a treating or examining physician's stated opinion is
 24 materially inconsistent with the physician's own treatment notes,
 25 legitimate grounds exist for considering the purpose for which the
 26 doctor's report was obtained and for rejecting the inconsistent,
 27 unsupported opinion. *Nguyen v. Chater*, 100 F.3d 1462, 1464 (9th Cir.
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1 1996.) Rejection of a medical source opinion is specific and
2 legitimate where the opinion is not supported by the doctor's own
3 medical records and/or objective data. *Tommasetti v. Astrue*, 533
4 F.3d 1035, 1041 (9th Cir. 2008).

5 In addition to accepted medical source opinions, the ALJ is
6 required to consider observations by "other sources," i.e., nurse
7 practitioners, physician's assistants, mental health therapists, and
8 social workers, as to how an impairment affects a claimant's ability
9 to work. 20 C.F.R. §§ 404.1513(d), 416.913(d); *Sprague*, 812 F.2d at
10 1232. Although, under the Regulations, other sources cannot
11 establish a medically determinable impairment, the Commissioner has
12 ruled that weight given to their opinions must be evaluated on the
13 basis of certain factors, e.g., their professional qualifications,
14 how consistent their opinions are with the other evidence, the
15 amount of evidence provided in support of their opinions, whether
16 the other source opinion is well-explained, and whether the other
17 source "has a specialty or area of expertise related to the
18 individual's impairment." *Social Security Ruling (SSR) 06-03p*.² An
19 adjudicator may consider these factors in giving the non-medical
20 treatment provider's opinion more weight than that of an acceptable
21 medical source. *Id.* A full explanation of the weight given an

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23 ² Social Security Rulings are issued to clarify the Regulations
24 and policy. They are not published in the federal register and do
25 not have the force of law. However, under the case law deference is
26 to be given to the Commissioner's interpretation of the Regulations.
27 *Ukolov v. Barnhart*, 420 F.3d 1002 n.2 (9th Cir. 2005); *Bunnell v.*
28 *Sullivan*, 947 F.2d 341, 346 n.3. (9th Cir. 1991).

1 other source opinion must be included in the ALJ's decision when the
 2 other source is given greater weight than a treating source opinion.

3 *Id.*

4 A review of the record shows Dr. Lundberg stated in a November
 5 7, 2006, clinic note that Plaintiff could "certainly do light duty
 6 work." (Tr. 13, 18, 303.) As mentioned above, this comment was
 7 entered after responding to Plaintiff's phone call, in which she
 8 specifically asked if she could do some light duty work. (Tr. 303.)
 9 On January 24, 2007, Dr. Lundberg signed a medical evaluation form
 10 report indicating Plaintiff was severely limited and should not lift
 11 more than five pounds. (Tr. 319.) The ALJ did not mention this form
 12 report specifically in his summary of the medical evidence or his
 13 discussion of Dr. Lundberg's opinions. (Tr. 14, 18.) Although an
 14 ALJ is not required to discuss all evidence presented, the fact that
 15 in January 2007, Dr. Lundberg found Plaintiff unable to lift more
 16 than five pounds and severely limited in her ability to do certain
 17 job tasks renders this medical opinion sufficiently significant to
 18 address and either credit or reject. See *Vincent v. Heckler*, 739
 19 F.2d 1393, 1394-95 (9th Cir. 1984). Defendant's argument that this
 20 omission is harmless error because there is evidence in the record
 21 to justify rejection by the ALJ is not persuasive. First, the court
 22 may not make findings for the Commissioner. The reviewing court is
 23 "constrained to review the reasons the ALJ asserts." See *Connell v.*
 24 *Barnhart*, 340 F.3d 871, 874 (9th Cir. 2003). Further, the ALJ did
 25 not address the opinion, so it cannot be certain that he considered
 26 it in his evaluation. The court can neither grant nor deny benefits
 27 based on evidence the Commissioner did not address. *Id.* Second,

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1 Defendant's argument that the court should apply the Sixth Circuit's
2 harmless error standard is misplaced. (Ct. Rec. 16 at 7, citing
3 *Blakley v. Commissioner of Soc. Sec.*, 581 F.3d 399, 409 (6th Cir.
4 2004)). In *Blakley*, the Sixth Circuit held it would be harmless
5 error if an ALJ "fails to give good reasons on the record for
6 according less than controlling weight to treating sources" if the
7 opinion is "'so patently deficient that the Commissioner could not
8 possibly credit it.'" *Blakley*, 581 F.3d at 409 (emphasis
9 added)(citation omitted). This standard does not apply in this
10 case.

11 The Regulations require the ALJ to consider all medical
12 opinions, and here, the ALJ gave no reasons for ignoring an opinion
13 that conflicts significantly with an opinion by the same treating
14 source that was given controlling weight. As held by the Sixth
15 Circuit, "the ALJ's incomplete weighing of [claimant's] treating
16 sources is not an excusable *de minimis* procedural violation." *Id.*
17 This apparent contradiction in medical evidence from Plaintiff's
18 treating source cannot be ignored or considered a harmless oversight
19 of the Commissioner.

20 The Commissioner has the sole responsibility for resolving
21 conflicts in the medical evidence; therefore, it was reversible
22 error for the ALJ to ignore these contradictory opinions. As stated
23 above, the court can neither deny nor grant benefits based on
24 evidence not addressed. Accordingly, remand for additional
25 proceedings and a new ALJ decision is appropriate. See *Winans v.*
26 *Bowen*, 853 F.2d 643, 647 (9th Cir. 1987). Independent review
27 indicates Dr. Barinaga and ARNP Burnham also have had a lengthy
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1 treating relationship with Plaintiff and submitted clinic notes and
2 evaluation reports indicating she is severely limited in her ability
3 to perform work tasks. (Tr. 445-52.) On remand, weight given to
4 Dr. Barinaga's clinic notes and opinions regarding Plaintiff's
5 limitations shall be fully explained, and specific, legally
6 sufficient reasons shall be given if her opinions are rejected.
7 Further, the opinions of treating ARNP Burnham shall be discussed
8 and weight given as directed by the Commissioner in SSR 06-03p.

9 **C. RFC Determination**

10 The RFC determination represents the most a claimant can still
11 do despite her physical and mental limitations. 20 C.F.R. §§
12 404.1545, 416.945. In assessing the RFC, an adjudicator must
13 consider carefully all medical evidence provided and determine what
14 work-related activities a claimant can perform. In determining
15 what a claimant can still do despite her severe impairments,
16 consideration must be given to medical source statements from
17 treating and consultative medical examiners. SSR 96-5p. Because
18 the ALJ failed to adequately explain weight given or properly reject
19 probative evidence from Drs. Lundberg and Barinaga and ARNP Burnham,
20 the final RFC determination is not supported by substantial
21 evidence. Further, it appears the ALJ relied primarily on non-
22 examining agency physician opinions in assessing Plaintiff's
23 physical RFC (Tr. 18-19, 403-10), and a brief, unexplained clinic
24 note from Dr. Lundberg. (Tr. 18, 303.) This is not substantial
25 evidence on which to base this critical determination. *See Lester*,
26 81 F.3d at 831.

27 Because the evidence is ambiguous regarding Plaintiff's ability
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1 to perform work activities, on remand, the ALJ shall develop the
2 record regarding Plaintiff's physical capacities, psychological -
3 mental limitations due to depression, the effects of multiple
4 medications, and the severe impairment of opioid dependence. 20
5 C.F.R. §§ 416.926(a)(c); 416.945(a)(3); *see Mayes v. Massanari*, 276
6 F.3d 453, 459-60 (9th Cir 2001) (inadequate or ambiguous evidence
7 triggers ALJ duty to develop record). The ALJ will then make a new
8 RFC determination incorporating all of Plaintiff's credible
9 limitations. Additional relevant records may be requested by the
10 Commissioner, or submitted by Plaintiff, including mental health and
11 chemical dependency counseling records from Palouse County
12 counseling, which are referenced in the record. (Tr. 559, 594,
13 617.) Attempts to obtain additional records should be described in
14 the record. New vocational expert testimony must be taken at steps
15 four and five to consider the effects of Plaintiff's newly assessed
16 RFC on her occupational base. *Gonzalez v. Sullivan*, 914 F.2d 1197,
17 1202 (9th Cir. 1990). Accordingly,

18 **IT IS ORDERED:**

19 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 13**) is
20 **GRANTED** and the matter is remanded to the Commissioner for
21 additional proceedings pursuant to 42 U.S.C. § 405(g) and as
22 directed above.

23 2. Defendant's Motion for Summary Judgment dismissal (**Ct.**
24 **Rec. 15**) is **DENIED**.

25 3. Application for attorney fees may be made by separate
26 motion.

27 The District Court Executive is directed to file this Order and
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1 provide a copy to counsel for Plaintiff and Defendant. The file
2 shall be **CLOSED** and judgment entered for **PLAINTIFF**.

3 DATED August 20, 2010.

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5 S/ CYNTHIA IMBROGNO
6 UNITED STATES MAGISTRATE JUDGE

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ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND REMANDING
FOR ADDITIONAL PROCEEDINGS PURSUANT TO 42 U.S.C. § 405(g) - 16